Sinnasamy a/l Subbiah v Timbalan Menteri Dalam Negeri, Malaysia & Ors

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO 44–6 OF 2003
BALIA YUSOF JC
20 NOVEMBER 2003

Criminal Procedure — Habeas corpus — Emergency (Public Order and Prevention of Crime) Ordinance 1969, detention under — Whether Deputy Minister failed to fully consider grounds of detention — Whether notice in s 5(2) of the Ordinance was defective — Whether court could interfere — Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4(1), 5(1), 5(2)

This is an application for a writ of habeas corpus. The applicant was arrested by the police and by an order made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'), he was ordered by the Deputy Minister of Home Affairs ('the Deputy Minister') to be detained for a period of two years at the Pusat Pemulihan Akhlak Simpang Renggam, Johor. The applicant cited some grounds in support of his application; that the Deputy Minister failed to fully consider the grounds of the detention, the Deputy Minister acted mechanically and failed to apply his mind, there was a breach of art 5 of the Federal Constitution and that the notice in s 5(2) of the Ordinance informing the applicant of his right to make representations under s 5(1) was defective as it cited an unknown provision or section of law. The applicant also filed an affidavit by Arumugam a/l Manikam stating that the grounds of detention were baseless.

Held, dismissing the application:

(1) The applicant's challenge of the order made against him on the grounds that he puts forth was in actual fact an attempt to question the sufficiency of the Deputy Minister's satisfaction in issuing the said detention order. This court was precluded from adjudicating on the sufficiency of the Minister's satisfaction. It was clear that unless the applicant could convince this court that there has been a procedural defect in the issuing of the detention order, the exercise of the Minister's powers was beyond this court's powers to interfere (see paras 9 and 11).

(2) The applicant's affidavit in support of this application and further the affidavit of one Arumugam a/l Manikam in encl 8 raised not a single issue of procedural infringement in the issuance of the detention order by the Minister but focused only on the issue of the sufficiency of the grounds on which the said detention order was made (see para 12).

(3) While it may be true that exh BG 5 is defective in quoting a provision which is unknown in the Ordinance, the fact remains that the applicant has certainly been served with the proper order and he has not been prejudiced by the so called defective notice. Pursuant to the said notice he has exercised his rights under s 5(1) of the Ordinance and nothing has been deprived of him. Further there is no statutory form for the notice and s 5(2) of the Ordinance merely provides that the applicant

be informed of his right to make representations against the order to an Advisory Board. The applicant's objection on this ground was therefore without merits (see para 13).

[**Bahasa Malaysia summary**

Ini adalah permohonan untuk writ habeas corpus. Pemohon telah ditangkap oleh polis dan melalui satu perintah yang dibuat di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan itu'), beliau diperintahkan oleh Timbalam Negeri Dalam Negeri ('Timbalan Menteri itu') untuk ditahan selama dua tahun di Pusat Pemulihan Akhlak Simpang Renggam, Johor. Pemohon telah memberi beberapa alasan untuk menyokong permohonannya iaitu; bahawa Timbalan Menteri gagal menimbangkan sepenuhnya alasan-alasan tahanan itu, Timbalan Menteri berkelakuan dengan tidak menimbangkan keadaan, terdapat perlanggaran perkara 5 Perlembagaan Persekutuan dan bahawa notis di dalam s 5(2) Ordinan itu yang memberitahu pemohon mengenai hak beliau untuk membuat representasi di bawah s 5(1) adalah cacat kerana ia menyebut satu peruntukan yang bukan satu peruntukan undang-undang. Pemohon juga memfailkan satu afidavit daripada Arumugam a/l Manikam menyatakan bahawa alasan-alasan tahanan tidak berasas.

Diputuskan, menolak permohonan itu:

(1) Cabaran perintah tahanan pemohon pada alasan-alasan yang diberinya adalah percubaan untuk menyoal kecukupan kepuasan Timbalan Menteri di dalam mengeluarkan perintah itu. Mahkamah ini tidak dapat menghukum kecukupan kepuasan Timbalan Menteri itu. Jelas bahawa kecuali jika pemohon dapat memuaskan mahkamah ini bahawa terdapat kesilapan prosedur di dalam pengeluaran perintah tahanan itu, mahkamah tidak dapat mencampur tangan di dalam pelaksanaan kuasa Timbalan Menteri (lihat perenggan-perenggan 9 dan 11).

(2) Afidavit sokongan pemohon menyokong permohonannya dan afidavit Arumugam a/l Manikam di dalam kandungan 8 tidak membangkitkan sebarang isu pelanggaran prosedur di dalam pengeluaran perintah tahanan itu oleh Menteri tetapi hanya memfokus pada kecukupan alasan-alasan perintah tahanan itu (lihat perenggan 12).

(3) Walaupun eksh BG 5 adalah defektif di dalam menyatakan peruntukan yang bukan peruntukan undang-undang di dalam Ordinan itu, faktanya adalah pemohon telah disampaikan dengan perintah yang betul dan tidak diprejudiskan oleh notis yang cacat. Mengikut notis, beliau telah menggunakan haknya di bawah s 5 Ordinan dan tiada apa-apa yang telah lucut daripadanya. Lagipun, tiada bentuk undang-undang untuk notis dan s 5(2) Ordinan itu hanya memperuntukkan bahawa pemohon mesti diberitahu mengenai haknya untuk membuat representasi terhadap perintah kepada Lembaga Penasihat. Bantahan pemohon terhadap alasan ini tidak bermerit (lihat perenggan 13).]

Notes

For cases on detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1757.

Cases referred to

Chua Teck v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1989] 3 MLJ 118 (refd)
Henry Arumanathan v Deputy Minister of Home Affairs & Ors [1995] 1 CLJ 683 (refd)
Tan Sri Raja Khalid bin Raja Harun, Re; Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun [1988] 1 MLJ 182 (refd)
Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors [1988] 2 CLJ 543 (refd)
Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss4(1), 5(1), (2), 7C
Federal Constitution art 5

Sundarajan (Sundarajan & Associates) for the applicant.
Abdul Rani bin Megat Kassim (Senior Federal Counsel) for the respondent.

Balia Yusof J:

[1] This is an application for a writ of habeas corpus. The applicant aged 43 years old was arrested by the police and by an order dated 24 September 2002 made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'), he was ordered by the Deputy Minister of Home Affaires ('the Deputy Minister') to be detained for a period of two years at the Pusat Pemulihan Akhlak Simpang Renggam, Johor commencing from the same date.

[2] A number of grounds have been cited by the applicant in support of his application through the affidavit in encl 4 and before I dwell further into those grounds suffice for me to state that in essence, the complaint of the applicant rests mainly if not entirely on the ground that the Deputy Minister has failed to fully consider the grounds of detention and the facts of the case leading to his detention. In this respect, it would be pertinent to reproduce para 6 of the applicant's affidavit in support of this application which goes as follows:

> 6 Saya menegaskan di sini bahawa Timbalan Menteri Dalam Negeri tidak mengambil kira dengan secukupnya alasan-alasan dan fakta-fakta bagi tuduhan saya di bawah s 4 Ordinan tersebut. Ini adalah kerana:
>
> (a) Bagi tindakan pertama saya tidak melakukan tindakan salah sepertimana yang terdapat dalam tuduhan. Dan ini telah dinyatakan sendiri oleh dua saksi iaitu A1 dan A2 yang telah memberi keterangan dokumen terhadap saya.

(b) Bagi tuduhan kedua, saya juga tidak melakukan apa-apa kesalahan dan juga tidak langsung pergi ke tempat kejadian sepertimana yang tercatat dalam tuduhan. Pernyataan ini sendiri diakui oleh kedua-dua saksi iaitu (A1 dan A2) yang telah memberi keterangan terhadap saya.

[3] The other ground forwarded by the applicant comes in the usual common allegations against the Minister acting mechanically and without applying his mind, a breach of art 5 of the Federal Constitution in respect of the applicant's right to counsel upon his arrest and initial detention. The applicant also alleges that there was a deliberate act on the part of the police in naming him as the leader of the gang when in actual fact he is not at all involved in the matter, a frame up, so to say. In that respect he contends that the ground of detention given by the Deputy Minister is baseless, wrong and therefore it vitiates the detention order.

[4] The applicant also filed two other affidavits in encll 7 and 19 in reply to the various affidavits filed by the respondents and via encl 8, an affidavit affirmed by one Arumugam a/l Manikam, the applicant through the said Arumugam a/l manikam contends that the ground of detention given by one Pn Marsila bte Yakub, the Penolong Setiausaha Kementerian Dalam Negeri who prepares the 'alasan-alasan dan tuduhan-tuduhan fakta yang atasnya Perintah Tahanan di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969' is without basis.

[5] The said grounds and allegation of facts form the basis of the detention order issued by the Deputy Minister on 24 September 2002.

[6] By way of reply to all these allegations the respondents have filed ten affidavits in reply and this court has gone through the arduous task of scrutinizing each and every one of those affidavits in determining whether the respondents have breached any of the procedures in issuing the order of detention on the applicant. To start with, I would again be reminded by what was said by Salleh Abas LP in *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182, where at p 186 he stated:

"Where a person who has been deprived of his liberty challenges the detention it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown it is for the detainee to show that the power had been exercised mala fide or improperly or made for a 'collateral' or 'ulterior' purpose.

[7] It is trite law that the power of this court in habeas corpus proceedings to examine the grounds upon which the decision of the authority was based is not without restrictions. Abdoolcader J (as he then was) in *Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 at p 282 said the following.

It is, of course, settled law that the subjective determination of the Minister is not justiciable (*Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 136*; Sadhu Singh v The Delhi Administration* AIR 1966 SC 91). The courts have consistently declined the review the exercise of ministerial discretion when its validity is impugned in habeas corpus proceedings (*Liversidge v Anderson* [1942] AC 206*; Greene v Secretary of State for Home Affairs* [1942] AC 284). The court

cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded but can examine the grounds disclosed by the Minister to see they are relevant to the object which the Ordinance prescribes. In proceedings such as these the court does not sit in appeal against the decision of the Minister regarding materials on which the detention order was made. The court does not examine the adequacy or truth of these materials and cannot interfere with the decision on the ground that if the court had examined them it would have come to a different conclusion.

[8] (See also *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [1988] 2 CLJ 543, *Chua Teck v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1989] 3 MLJ 118).

[9] In issuing the order of detention against the applicant, the Deputy Minister as affirmed in his affidavit, indicated that upon perusing the investigation report regarding the activities of the applicant he was satisfied that the applicant was actively involved in criminal activities involving violence and that it was necessary to prevent him from so acting. The grounds upon which the said detention order was made is attached to the detention order and served on the applicant is reproduced as follows:

Alasan-Alasan Yang diPerintah itu diBuat

Bahawa kamu, adalah seorang ketua kumpulan Aru yang telah melibatkan diri kegiatan jenayah kekerasan.

[10] The allegation of facts accompanying the said detention order contained two charges of robbery in which the applicant was involved indicating the use of violence. The applicant contends that the above stated grounds are not true and denies that he was the leader of the group and he further relies on the affidavit of one Arumugam a/l Manikam (encl 8) who deposed that the applicant was not involved as suggested in the grounds of detention and allegation of facts accompanying the detention order. In my view, what the applicant is doing in challenging the order made against him on the grounds that he puts forth is in actual fact an attempt to question the sufficiency of the Deputy Minister's satisfaction in issuing the said detention order. This court is precluded from adjudicating on the sufficiency of the Minister's satisfaction. (See *Chua Teck v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* and *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia & Ors*). The numerous affidavits filed by the applicant in support of his application point towards only one direction, namely, the correctness and the sufficiency of the grounds on which the detention order issued by the Deputy Minister was based on, and that is within the province of which this court is incompetent to adjudicate.

[11] The learned senior federal counsel in his submission cited s 7C of the Ordinance and referred to the case of *Henry Arumanathan v Deputy Minister of Home Affairs & Ors* [1995] 1 CLJ 683 to bring home the point that the issues raised by the applicant is non-justiciable. Section 7C reads:

7C(1) There shall be no judicial review in any court of, and no court shall have or exercise jurisdiction in respect of, any act done or decision made by the Yang Di-Pertuan Agong or the Minister in the exercise of their discretionary power in

A accordance with this Ordinance, save in regard to any question on compliance with any procedural requirement in this Ordinance governing such act or decision.

[12] 'Judicial review' as stated in the abovementioned section includes a writ of habeas corpus. In the light of the above provisions it is clear that unless the applicant can convince this court that there has been a procedural defect in the issuing of the detention order, the exercise of the Minister's powers is beyond this court's powers to interfere. In my view, the applicant's criticism of the detention order touches not on the procedural aspect of the order but on the Minister's subjective satisfaction. In this respect it is pertinent to quote what Mohd Hishamudin JC (as he then was) opined in the above stated case where at p 686 he said:

> In my view, and with respect to learned counsel, I cannot accept his contention that his submission concerns only a point of procedure. I fail to see how the question as to whether or not the factual basis of the order, as disclosed by the Minister supports or is consistent with the Minister's purpose (in ordering the detention) could be regarded as a procedural issue (and hence falls within the court's power to review). To my mind learned counsel's criticism strikes not at the procedural aspect of the detention order but at the exercise of judgment on the part of the Minister in determining the purpose of the detention. In other words, learned counsel, by his argument, is in effect, inviting this court to examine the factual basis of the Minister's declared satisfaction in the detention order. I must decline the invitation. For clearly ss 7C and 7D preclude this court from embarking upon such an examination.

[13] A close scrutiny of the applicant's affidavit in support of this application in encll 4,7 and 19 and further the affidavit of one Arumugam a/l Manikam in encl 8 raised not a single issue of procedural infringement in the issuance of the detention order by the Minister but focused only on the issue of the sufficiency of the grounds on which the said detention order was made. Such as attempt is not permissible and accordingly this application must fail.

[14] Learned counsel for the applicant has also launched an attack on exhBG 5 in encl 18, an affidavit by one Chief Inspector Buba Garan a/l Balakrishnan. In the said affidavit, the deponent affirmed that he has served a copy of exh BG 5, a notice under s 5(2) of the Ordinance informing the applicant of his right to make representations under s 5(1) of the same. In the said exh BG 5, reference was made to an order of detention made by the Deputy Minister pursuant to s 491 of the Ordinance. In this respect, it was contended by the learned counsel that this notice is defective on the ground that an unknown section/provision of the law has been cited in the said notice. It therefore breaches the mandatory requirement of s 5 of the Ordinance. The said notice was served and acknowledged by the applicant on 24 September 2002 and on 27 November 2002 the applicant did make representations to the Advisory Board and appeared with his counsel as deposed by the Setiausaha, Lembaga Penasihat, Jabatan Perdana Menteri in encl 5. The order of detention that was served on the applicant as shown in exh S-1 in encl 4 clearly shows that it was an order made under s 4(1) of the Ordinance and was so served together with exh BG 5 of encl 18. In the light of the facts and circumstances of this case, while it may be true that exh BG 5 is defective in quoting a provision which is unknown in the Ordinance, the fact remains that the applicant has

certainly been served with the proper order and he has not been prejudiced by the so called defective notice. Pursuant to the said notice he has exercised his rights under s 5(1) of the Ordinance and nothing has been deprived of him. Further, one must not fail to note that there is no statutory form for the notice and s 5(2) of the Ordinance merely provides that the applicant be informed of his right to make representations against the order to an Advisory Board. The applicant's objection on this ground is therefore without merits.

[15] For the reasons above stated, the application for a writ of habeas corpus is dismissed.

Appliaction dismissed.

Reported by Chew Phye Ken